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# In the Supreme Court of the United States

OCTOBER TERM, 1962

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TRUMBULL ASPHALT COMPANY OF DELAWARE,
*Petitioner*

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

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No. 1056

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*Petitioner*

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 314 F. 2d 382. The Decision and Order of the National Labor Relations Board (P.A. 40-143)[1] are reported at 136 NLRB 1461.

[1] "P.A." references are to the appendix to petitioner's brief and "B.A." references are to the appendix to the Board's brief, in the court below.

## JURISDICTION

The judgment of the court of appeals was entered on March 26, 1963 (Pet. App. 4a-5a). The petition for a writ of certiorari was filed on April 26, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner, in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, coerced and restrained its employees in the exercise of their organizational rights, and discriminated against employees because of their union membership.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, p. 14.

## STATEMENT

### A. The Board's Findings of Fact

#### 1. Interference, restraint and coercion

The Union[2] started an organizing campaign among petitioner's employees in August 1960; union cards and union buttons were distributed and organizational meetings were held (P.A. 53; 162, 163-165, 200-202, 227-228, 250, 517, 547). On October 14, 1960, a majority of the employees, in a Board-conducted election, selected the Union as their representative (P.A. 54-54, B.A. 22-26).

[2] Warehouse and Mail Order Employees Union, Local 743, International Brotherhood of Teamsters.

Two days before the election, Plant Manager Miller remarked to Kubiak, the Union's chief steward, "I hear you are one of those C.I.O. bastards," and added that Kubiak would be out of a job if the Union were to lose the election (P.A. 61; 517-518, 627). On the same day Shop Foreman Bonow told two employees, James Harris and L. T. Prince, that if they voted for the Union they would be out of work (P.A. 66; 564-565). About a week after the election Miller told employee Jackson, "You are one of those G— d— C.I.O. boys. You won't be here long" (P.A. 117-118; 489). On election day petitioner's assistant plant superintendent, Jandak, offered an employee $10 to vote against the Union, and told employees Jones and Steele that Miller had a ditch to put them in if the Union won the election (P.A. 47, 67-68, 71; 574-576). After the election, Pounovich, petitioner's yard foreman, told Harris and Prince that they should not have voted the Union in, and that Miller was going to lay them off or make them quit (P.A. 66-67; 498).

Pounovich also approached employee Samuel Jackson before the election and inquired whether he had signed a union card. Several weeks later he asked him to go to the union meeting and report what everybody said. Jackson refused (P.A. 63-64; 478, 480-482). On the day of the election, Pounovich told employee Steele that he had no business wearing a union button, and, when Steele stated that he was "for the union," Pounovich commented that Steele had "a lot of union paper in the back of [his] car" (P.A. 65; 576).

After the election, Miller abolished the ten minutes wash-up time that had been in effect for a group of plant workers. He told several employees, by way of

explanation, "You guys voted the union in. What you get, you going to work for" (P.A. 63; 499).

**2. Assignment of union employees to less agreeable work, and their loss of extra work**

Three days prior to the election, Union Shop Steward Morton was transferred from the job of lift truck operator, which he had held for two years, to that of removing spilled asphalt. When he reported to Supervisor Kregul and asked why this disagreeable work had been assigned to him, Kregul replied, "That is what the union gets for you" (P.A. 68; 167, 168). Morton remained on clean-up work for about three months and during much of that period worked alone, though previously several men had assisted the clean-up man in handling spilled asphalt (P.A. 68-69; 169-170, 212, 238).

After the election, Plant Manager Miller called Edison Jones, Sr., an older man who performed light janitorial work. When Jones stated that he understood that Miller considered him and his son as "ringleaders of the union," Miller replied that he knew who the ringleaders were and added, "If the C.I.O. don't get in here every S-O-B- will be gone" (P.A. 72-74, 347-348, 350-351). After the conversation Jones was assigned loading work, including the moving of drums weighing 500-600 pounds by hand truck (P.A. 74-76, 178, 353). His janitorial work was assigned to Willie Davis, who subsequently was selected by Miller to distribute an anti-union petition (P.A. 76, 800; see *infra*, p. 10.

Anderson Crayton, an early adherent of the Union and known as such to his foreman, had the job of setting up drums for pouring asphalt at the time of

the election. He was in his fifties, and his work assignments during the seven years of his employment progressed from heavier to lighter work (P.A. 77-78, 174, 222-223, 232). After the election, Miller assigned Crayton to the cleaning of the plant's railroad track. Although that work previously had been performed by a crew of several men, Crayton performed it alone and, in addition, was directed by Miller to clean the track for a greater distance. After two weeks Crayton was assigned the same work as Edison, Sr.—the moving of heavy drums (P.A. 77-78; 175, 231-232, 236, 296, 683).

In addition, after the election, six union adherents, including two union stewards, were deprived of Saturday work, while other employees in the same classification worked on that day. When they asked their respective supervisors for the reason, the men were told that Plant Manager Miller had ordered it because they were union members, and that "the C.I.O. don't work six days here."[3] Moreover, during the 13 weeks following the election, five of the six employees who had been deprived of Saturday work, worked an average of less than 37 hours per week, while other employees doing similar work, who were not union supporters or had been lukewarm in their support, worked substantial amounts of overtime.[4]

### 3. Discriminatory layoffs and discharges

#### (a) The layoffs of October 20, 1960

Six days after the election, petitioner laid off 11 of the 12 laborers in the paint shop (P.A. 84-85; 328-

[3] See P.A. 80-84, 194, 230-231, 267-268, 316-318, 354-355, 484-485.

[4] See P.A. 67, 82-84; 477, 574-575, 724-725, 797; B.A. 33-35, 45, 77, 79.

329, 340, 376, 378, 388, 408, 425, 464, 565, 937). All 11 employees were union adherents and the one retained, Leaman Tate, was opposed to the Union (P.A. 86-88; 325, 334, 366, 385-386, 407-408, 425-426, 457, 467, 474, 495, 563-564). Before the election Foreman Bonow had told four of these men that if they voted for the Union they would be laid off (P.A. 66; 326-327). After getting their checks, five of the employees went to see Plant Manager Miller, who remarked, "Get paid from the C.I.O. The union men get paid from the C.I.O." (P.A. 92-93; 378). About the same time, William Jenkins, one of the laborers affected, asked supervisor Bonow how long it would be before the laid off men would be called back. Bonow answered, "To tell you the truth, Jim Miller is mad, and you and L. T. Prince [another laid off employee] won't make it back" (P.A. 93; 328). And, while Bonow was talking to laid-off employee Allen Davis, Yard Foreman Pounovich came up and remarked, "What is the union going to do with them now? * * * send them over to Africa?" (P.A. 91; 391).

In the first week following the layoff, Tate, the non-union employee who was retained, worked 52 hours, and in the 9—week period beginning with that week he averaged over 60 hours per week (P.A. 87-88, 97, 191-192, 776; B.A. 35-51). Some of the laid-off employees were subsequently recalled. However, of those recalled, Harris was later forced out (*see infra*, p. 7). Larry was returned to work after he had signed an anti-union petition (P.A. 90; 699-700, 870-871, 922, 936), and McNeal and Jenkins were not taken back until after the strike called by the Union had ended (P.A. 90; 619-620, 698, 699). Petitioner never re-

called the remaining employees who had been laid off (P.A. 90; 636-637).

**(b) The forced resignations of November 7, 1960**

James Harris, one of the employees laid off on October 20, was recalled on October 25 (P.A. 101-102; 501). Shortly after his recall, Yard Foreman Pounovich told Harris and another employee that they should not have voted the Union in, and that Miller was going to lay them off or make them quit (P.A. 101; 498). On November 6, Miller transferred Harris to a building where the air was full of dust. Harris had an injured eye and in the past Miller, because of that condition, had given Harris light work. On November 7, Harris, whose eye began to run, asked Miller for other work, reminding him of his injury. Miller replied that Harris should have thought of his eye injury when he voted for the Union (P.A. 85, 102-105; 501-504, 685). Harris then asked Miller to give him his "time" and received his final paycheck on November 8 (P.A. 103; 504).

Will Steele was questioned on election day by Pounovich about his union button, and was warned that Miller had a ditch to put him in if the Union won (*supra*, p. 3). He had been employed since 1954, stacking heavy bags that came from a conveyor belt, and during most of the time had done the work together with a helper (P.A. 105; 572-573, 578-579, 585-586, 743-744). When he reported for work on November 7, he found himself without a helper, and told Assistant Superintendent Jandak that he needed help. Jandak replied, "If you can't stack the bags yourself, you go home and tell the union about it" (P.A. 46, 105; 577-578). Steele appealed to Miller to assign him

a helper, but Miller refused (*ibid.*). After Steele left the plant, another employee was assigned Steel's work and was given a helper (P.A. 106; 698, 852; B.A. 117). Steele reported for work on the next day, and Jandak asked him whether he would stack the bags alone. Steele replied that he was unable to do so, whereupon Jandak stated that petitioner did not want him (P.A. 105-106; 578, 747-748).

**(c) The layoffs in January 1961**

In January 1961 petitioner laid off seven employees, all of whom had participated in union activities (P.A. 108, 115, 116-117; 201-202, 207, 223-224, 226-227; 266, 287, 315-316, 348-349). Five of these employees, including union stewards Morton and Crayton, had previously been assigned less desirable work because of their union activity (see *supra*, pp 4-5). When in April 1961, employee Harris called Miller to ask that these employees be returned to work, Miller replied that he knew everybody who had voted for the Union. When Harris said that one of the laid off men (Nathan) had not done so, Miller replied that Nathan's layoff had been a mistake (P.A. 108, 116; 288-289, 506-509). Although petitioner gave lack of work as a reason for the layoff, most of the employees who remained thereafter worked overtime (P.A. 111; B.A. 79-117). Moreover, although its practice was to have layoffs governed by seniority, petitioner retained employees with less seniority than those laid off, notwithstanding that the latter were equally capable of performing the work (P.A. 114-115; 162-163, 222-223, 259-260, 283, 314, 345, 467, 473, 662, 812, 827, 904, 928-930; B.A. 79-115). The laid off employees except for

Nathan and Edison Jones, Sr.,[2] were not called back to work until June 1961, after the strike called by the Union had ended (P.A. 107; 640, 699).

**(d) The discharges of February 8, 1961**

Edmund Dykier had worked for petitioner since 1955 as a shipping clerk on the midnight to 8 a.m. shift (P.A. 117; 433-434). He had joined the Union and attended several meetings (P.A. 435). Yard Foreman Poumovich told him about a week before the election, "I wouldn't join the union if I were you * * *" (P.A. 117; 437-438). At 1 a.m., on February 8, 1961, he had a headache, took an aspirin and fell asleep at his seat (P.A. 118; 442-444, 613-614). He knew that if a truck arrived he would either hear it or the driver would tap on the window behind which Dykier sat (P.A. 118; 445). Sleeping on the midnight shift was not uncommon and Foreman McCurdy, who directed workers on the night shift, had at times observed employees sleeping without reporting them (P.A. 121; 732-733, 887-888, 895-896). However, when McCurdy saw Dykier sleeping, he immediately reported it to Plant Manager Miller, calling him at home at 2 a.m. (P.A. 110, 119-120; 641, 732). Miller, who was under doctor's orders not to drive at night, phoned Poumovich, who drove him to the plant (P.A. 120; 601-602, 641). Miller promptly discharged Dykier (P.A. 120; 445).

When Miller arrived at the plant that night, McCurdy told him that Jackson, the pumper, also was napping (P.A. 121; 602, 613, 641-642). Jackson had

[2] Nathan and Jones were called back in April (P.A. 107; 358-359, 360-361, 640-699), shortly after Miller had acknowledged that Nathan's layoff had been a mistake (*supra*, p. 8) and Jones's son had circulated the anti-union petition (*infra*, p. 10).

worked for petitioner for over 10 years (P.A. 117; 476). But, he had refused to spy upon the Union when requested by Pounovich (*supra*, p. 3). Miller woke up Jackson and told him he was through (P.A. 119; 414, 483). Jackson asked Miller whether he wanted him to return on the following night. Miller replied, "No, you S-O-B-, you are through" (P.A. 119; 464).

**4. Sponsorship of a union withdrawal movement**

When Edison Jones, Jr., asked Miller on April 8, 1961, for more work, Miller cursed him for being pro-union. Jones replied that he "would be a company man for the overtime," and that he thought he could stop the Union since many men who had been laid off wanted to return to work. On April 14, Miller called Jones to his office and asked him to carry an anti-union petition for the employees to sign. He also told Jones that he would call the men back and give them backpay and a wage increase. When Jones told Miller that he wanted help, Miller directed him to employee Willie Davis, and then instructed both employees to get the petition signed in the employees' homes (P.A. 122-123, 126; 549-551; B.A. 85, 101). Davis circulated through the plant on April 15 and obtained 37 signatures, and on the following Sunday Jones and Davis obtained additional signatures and authorizations from employees (P.A. 124-126; 551, 556-557, 559, 785, 789, 870-871, 873-874, 876-878, 922). On April 21, Miller told Jones he could work as much overtime as he wanted, and thereafter Jones, who had worked only 32 hours since February, worked substantial overtime for a number of weeks (P.A. 122, 126, 553; B.A. 87-97, 109, 111, 113).

### B. The Board's Conclusions and Order

The Board, in agreement with the Trial Examiner, found that petitioner discriminated against its employees in violation of Sections 8(a)(3) and (1) of the Act by: (1) assigning more disagreeable work to Morton, Jones, and Crayton; (2) denying Saturday work to six employees; (3) laying off eight employees in October 1960; (4) forcing the resignations of Harris and Steele; (5) laying off seven employees in January 1961; and (6) discharging Dykier and Samuel Jackson in February 1961 (P.A. 136, 68-130). The Trial Examiner and the Board further found that petitioner violated Section 8(a)(1) of the Act by depriving employees of benefits enjoyed prior to their choice of the Union; by threatening to visit reprisals on union supporters and promising benefits for forsaking the Union; by interrogating employees as to their union sympathies; by attempting to get employees to spy on the Union; and by sponsoring a movement to withdraw from the Union (P.A. 136, 129).

The Board's order (P.A. 137-143), *inter alia*, requires petitioner to cease and desist from the unfair labor practices found, to offer reinstatement with back pay to employees discriminatorily discharged or laid off and not recalled, to make whole employees against whom petitioner had discriminated and who were temporarily laid off, and to post appropriate notices.

### C. The Decision of the Court of Appeals

The court below held that the Board's findings were supported by substantial evidence and enforced the Board's order in full (Pet. 1a-3a).

## ARGUMENT

Petitioner's principal contention is that the Board's findings are not supported by substantial evidence on the record as a whole (Pet. 16-26). This question does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In light of the facts detailed in the Statement, it is evident that the court below correctly concluded "that there is ample evidence to support the Board's findings" (Pet. App. 2a).

Contrary to petitioner's contentions (Pet. 5-16), the report of the Trial Examiner, which was adopted by the Board, sufficiently apprised petitioner of the basis for his decision to enable it to prepare intelligent exceptions and to obtain meaningful judicial review. As the court below pointed out (Pet. App. 3a), the report "is a detailed presentation and analysis of the evidence, containing inferences which the trier of fact is entitled to make." Neither Section 8(b) of the Administrative Procedure Act,[6] nor the demands of due process required anything more. See *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 529; *National Labor Relations Board* v. *State Center Warehouse*, 193 F. 2d 156, 158 (C.A. 9); *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 652 (C.A. 6); *Southern Railway Co.* v. *United*

[6] Section 8(b) of the Administrative Procedure Act (5 U.S.C. 1007(b)) provides, *inter alia*, that all decisions shall "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record * * *." The Attorney General's Manual on the Administrative Procedure Act, which is an authoritative guide to interpretation of that statute, states with reference to this section: "An agency which issues opinions in narrative and expository form may continue to do so without making separate findings of fact and conclusions of law." Att'y Gen. Manual on the Administrative Procedure Act 86 (1947).

*States*, 180 F. Supp. 189, 195 (E.D. Va., 3-judge court, per Sobeloff, Ch. J.); *Coyle Lines* v. *United States*, 115 F. Supp. 272 (E.D. La., 3-judge court).

Nor is there substance to petitioner's contention that the Trial Examiner's report demonstrated, on its face, bias and prejudice which vitiated the proceeding (Pet. 16-18). As the court below pointed out (Pet. App. 3a), "[t]he report is written in a rather dramatic style, but this does not make it susceptible to a charge that petitioner was denied due process of law." Petitioner fares no better in relying on the fact that the Examiner erroneously stated that the General Counsel's witnesses were segregated at the hearing and thus did not hear each other's testimony. This error, which was corrected by the Board (P.A. 59, 137), is manifestly insufficient to establish bias and prejudice on the Examiner's part. See *Berger* v. *United States*, 255 U.S. 22, 31; *Tumey* v. *Ohio*, 273 U.S. 510, 523.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1963.

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8.(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

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